No. 88-1597 (2)

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

October Term, 1988

The Board of Education of the Westside Community Schools (Dist. 66); Wayne W. Meier, President of the Westside Community School Board; James E. Findley, Principal of the Westside High School; James A. Tangdall, Assistant Superintendent of the Westside Community School District; and Kenneth K. Hansen, Superintendent of the Westside Community School District,

Petitioners,

Bridget C. Mergens, by and through her next friend, Dr. Daniel N. Mergens; Stephen P. Hollar, by and through his next friend, Mrs. Judith L. Hollar; Brian P. Rensing, by and through his next friends, Robert W. and Sherry K. Rensing; David K. Harris, by and through his next friends, Kenneth and Myra Harris; and Andrea Simmons, by and through her next friends, Robert L. and Linda Simmons,

Respondents,

United States Of America,

Respondent,

Kendra K. Kellison, etc, by and through her next of friends, Victor Kraatz and Linda Kraatz; Michelle M. Harris, etc. by and through her next of friends, Kenneth Harris and Myra Harris; and Kevin Brown, etc. by and through his next of friends, Robert W. Rensing and Sherry K. Rensing,

Respondents,

Matt Schulz, Ingrid Kimmons, Jason Brune, Jennifer Waggoner and Allison Wells.

Respondents,

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. May a public high school which makes its facilities available after school hours for the activities of student clubs, close its forum to a student group desiring to use the facilities on an equal basis with other student clubs for religious worship and discussion?

2. Does the Equal Access Act, 20 U.S.C. §§4071-4074 (1988), which codifies this Court's decision in Widmar v. Vincent, 454 U.S. 263 (1981), with respect to public secondary schools which receive federal funds, unconstitutionally establish a religion by requiring that a voluntary, student-initiated Bible Club which meets during non-instructional time be treated on an equal basis with other student clubs?

LIST OF PARTIES

All parties to the proceeding are listed in the caption. Respondents Matt Schulz, Ingrid Kimmons, Jason Brune, Jennifer Waggoner and Alison Wells were added as additional appellants by Order of the United States Court of Appeals for the Eighth Circuit on March 28, 1989.

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OPINIONS BELOW

The Opinion of the Court of Appeals for the Eighth Circuit is reported as Mergens v. The Board of Education of the Westside Community Schools, 867 F.2d 1076 (8th Cir. 1989). The Memorandum Decision of the United States District Court of Nebraska is not reported, but is reprinted at Appendix B of the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The pertinent provisions of the Equal Access Act, 20 U.S.C. §§ 4071-4074 (1988), are set forth in the Petition, page 3 and Appendix C.

I.

COUNTERSTATEMENT OF THE CASE

This case presents the question whether a public high school which makes its facilities available for the activities of approximately 30 voluntary student initiated groups, may selectively close its forum to a group of students desiring to use the facilities for religious worship and religious discussion. This case is Widmar v. Vincent, 454 U.S. 263 (1981) at the public secondary school level.

Westside High School (WHS) is a part of the Westside Community School system, an independent public school district which is managed, governed and controlled by the petitioners, the Board of Education of the Westside Community Schools. WHS is a public secondary school which receives federal funds as contemplated by the Equal Access Act 20 U.S.C. §4071-74 (1988).

Students who attend WHS are allowed to form, organize, and participate in various student groups and clubs which meet after required school hours on school grounds. Students may choose from approximately 30 different groups and clubs, all having faculty sponsors. Students are encouraged to initiate requests for the formation of WHS clubs. Attendance at club meetings is strictly voluntary and depends solely on student interest.

School Board Policy 5610 declares that student clubs are a "vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills." The policy does not impliedly or expressly classify these clubs as being related to the WHS curriculum.

There is no written policy or formal guideline for the formation of clubs. A student wishing to form a club would

normally be directed to the Assistant Principal and Activities Director, Ronald Huston, who would then analyze the proposed group's goals and objectives and decide whether or not the club complied with School Board Policy 5610.

Although the clubs are assigned faculty sponsors, participation varies and is primarily custodial in nature. The sponsors serve on a voluntary basis and may accept or decline remuneration for their services. No other student group had ever before been excluded from WHS on the basis of the content of speech.

For some students at WHS, Christian fellowship, Bible reading and prayer are a vital part of their lives. These students seek to form a Bible Club strictly for the purpose of engaging in religious worship and discussion with other interested students, just as other students are permitted through the various clubs at WHS. The students in this case have diverse religious backgrounds, and the

proposed Bible Club is to be open to any WHS student wishing to participate.

In January of 1985, respondents Bridget Mergens and Andrea Simmonds agreed they would like to start a Bible Club at WHS. Ms. Mergens presented this request to Dr. Findley, the principal of WHS. Ms. Mergens requested that the club be treated in the same manner as other WHS clubs but indicated that a teacher sponsor would not be required if the school could not or would not provide one. Instead of referring her to the Activities Director, as is customary, Dr. Findley immediately denied Ms. Mergens' request for a Bible Club based on the religious content of the club's speech.

Despite petitioner's allegations to the contrary, Dr. Findley testified at trial that he would also prohibit Ms. Mergens from informally meeting with other students at WHS to discuss religion on a

regular basis without official school approval:

> Q. The question is if you had known they were in the classroom discussing religious subjects on a voluntary basis, would you have asked them to stop doing that?
>
> A. If I perceived that as a formal thing that they were going to continuously do and emphasize within the building and if I perceived that was what was happening, I would probably not let them meet.
>
> (Tr. 611:4; 611:16; Findley).

In February 1985, Ms. Mergens presented her request to Dr. Findley and Dr. Tangdall, Associate Superintendent of Schools for the Westside Community Schools. At that time, the request was discussed with Kenneth Hansen, Superintendent of Schools for the Westside Community Schools. All three school officials agreed that the request be denied on the grounds that allowing such a club would violate the "separation of church and state."

On March 4, 1985, Ms. Mergens petitioned the Board of Education to allow

the Bible Club to meet. Ms. Mergens stressed that a faculty sponsor was not needed unless required by school policy. If one were required, Ms. Mergens said that the Bible Club would need a sponsor only for custodial purposes. Despite the fact that Ms. Mergens was willing to comply fully with School Board requirements, the School Board denied her request based on the contention that the proposed club would not be consistent with Board Policy which permits school buildings to be used only for school-sponsored activities.

On April 15, 1985, the respondents brought suit in the District Court for the District of Nebraska, alleging that the school's actions violated the Constitution of the United States, the Nebraska Constitution and the Equal Access Act. The case was tried to the Court in April 1987.

During trial, two experts testified for the respondents, Dr. Ward Sybouts, a

curriculum expert and Dr. David Moshman, an expert in child development.

Dr. Sybouts testified that he had studied the Equal Access Act, Equal Access guidelines, congressional testimony, and the WHS forum. He went on to say that in his opinion Congress had adopted a definition of curriculum which would include only those activities related to courses for which credit is given. Dr. Sybouts' opinion was that WHS offered noncurriculum related student clubs, including Interact, Chess Club, Welcome to Westside and Student Forum.

Dr. Moshman, an expert in the development of cognitive reasoning and intellectual development of children, testified that by age 12, students understand the difference between school sponsored or endorsed religious activities and voluntary student initiated and directed religious activity. His studies confirmed that there is no significant difference between the ability of a high

school student and a college student to make such a distinction.

The evidence at trial also established that the proposed Bible Club would be consistent with the missions and goals enumerated in School Board Policy 5610. The WHS administrators all admitted that the Bible Club could promote the stated goals and missions of the high school, including critical thinking, citizenship, wholesome attitudes, good human relations, knowledge and social skills.

On February 2, 1988, the District Court decided the case by holding that WHS maintains a closed forum and therefore the Equal Access Act does not apply. The court also held that the students' First and Fourteenth Amendment rights were not violated by the actions of school officials. The court found however, that the students at WHS could in fact distinguish between school endorsed religious activity and student initiated religious activities. Mergens v. The

Board of Education of the Westside Community Schools, No. CV 85-0-426, Slip Op. at 11, n.1 (1988). The court's finding effectively dismissed the contention that the Establishment Clause requires exclusion of a Bible Club from the WHS forum.

The Eighth Circuit Court of Appeals on February 8, 1989, reversed by holding that WHS maintains a limited open forum under the Equal Access Act, that the Equal Access Act is constitutional, and that this Court's decision in Widmar requires reversal. The court realized that the broad interpretation of "curriculum-related" adopted by WHS officials would permit school officials to circumvent the Equal Access Act by administrative decree while allowing them to arbitrarily deny unfavored student speech. Mergens v. The Board of Education of the Westside Community Schools, 867 F.2d 1076, 1079 (8th Cir. 1989). Relying upon legislative history, the Court found that by allowing

a Chess Club to meet, as well as other noncurriculum related clubs, WHS had created a limited open forum for student speech. Mergens, 867 F.2d at 1079.

The Eighth Circuit also held that the Equal Access Act closely tracks this Court's decision in Widmar and the only difference between this case and Widmar was the extension of Widmar principles to the high school level. In light of Congressional fact finding rejecting the notion that high school students would confuse an equal access policy with state sponsorship of religion, the court found that the Equal Access Act does not violate the Establishment Clause. Mergens, 867 F.2d at 1079-1080.

The Eighth Circuit concluded by stating that Widmar compels the same result even in the absence of the Equal Access Act. Mergens, 867 F.2d at 1080.

The court's holding with regard to impressionability is supported by the uncontroverted expert testimony of Dr.

Moshman and the District Court's finding of fact. Mergens, Slip Op. at 11 n.1. In addition, Justice Powell's controversial footnote in Widmar, 454 U.S. at 274, n.14 has been subsequently clarified in Bender v. Williamsport Area School District, 475 U.S. 534, 556 (1986), where Justice Powell noted that the difference in age between high school and college students does not justify a departure from Widmar.

II.

ARGUMENT

A. The Petition for a Writ of Certiorari should be denied because the Eighth Circuit Court of Appeals correctly decided this case in conformity with the Constitution of the United States and this Court's precedents.

The Opinion of Circuit Judge Theodore McMillian, joined by Chief Judge Donald Lay and Senior Circuit Judge Floyd R. Gibson is correct and represents a long overdue vindication of the free speech and religious liberty rights of high school

students. The decision comports with the precedents of this Court regarding student free speech rights, therefore, certiorari is inappropriate.

As noted by Judge McMillian, this case is virtually identical to Widmar except for the high school, rather than college, setting. Mergens, 867 F.2d at 1080. By utilizing the language of the Equal Access Act, which codified the principles of Widmar and extends that holding to secondary public schools, Mergens, 867 F.2d at 1079, the court recognized that WHS, like the University of Missouri at Kansas City, has created a limited open forum for student speech.

WHS actively maintains non-compulsory, non-credit student groups such as the Chess Club, Interact, a service club connected to Rotary International, and Subsurfers, a scuba diving club open to students and members of the general public. Mergens, 867 F.2d at 1078. Like UMKC, WHS refused to allow access to a

student group desiring to use the facilities for religious worship and religious discussion.

Consistent with this Court's decision in Widmar, an equal access policy "does not confer any imprimatur of State approval on religious sects or practices." Widmar, 454 U.S. at 274. The argument that impressionability of high school aged students changes this result was specifically rejected by the District and Circuit Courts. Mergens, Slip Op., at. 11, n.1; Mergens, 867 F.2d at 1080.

The present case is not only indistinguishable from Widmar, but consistent with each of this Court's rulings regarding student speech rights. In Bethel School District v. Fraser, 478 U.S. 675 (1986) the Court stated that a school need not tolerate student speech inconsistent with its "basic educational mission," or "wholly inconsistent with the 'fundamental values' of public school education." Bethel, 478 U.S. at 685-86.

There is no evidence in Mergens that a Bible Club would be inconsistent with the school's mission. To the contrary, administrators testified that a Bible Club would provide a 'means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills" as mandated by school board policy.

In Hazelwood School District v. Kuhlmeier, 484 U.S.____, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988), this Court dealt with the issue of school control over class related speech. The newspaper in that case was the product of the Journalism II class. It was part of the "regular classroom activity," a faculty member actively taught and exercised control over the paper, and students received grades and academic credit for their performance in the course, thus making the paper, by policy and practice, a closed forum subject to any reasonable regulation. Hazelwood, 98 L.Ed.2d at 603.

In Hazelwood, this Court reaffirmed

the principle that school facilities "may be deemed to be public forums" where school authorities "have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public' [citing Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 47 (1983)] or by some segment of the public, such as student organizations." [Citing Widmar]; Hazelwood, 98 L.Ed.2d at 603 (emphasis added). As noted by the Eighth Circuit, no club at WHS has ever been denied access to the school on the basis of speech content until the Bible Club was denied the right to form and meet. Mergens, 867 F.2d at 1077.

The facts in Mergens place it squarely within this Court's holdings in Widmar and Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). The speech is student-initiated and voluntary. The Bible Club would not disrupt school activities and furthers the educational mission of the school.

Permitting a Bible Club to meet under an "equal access" policy does not constitute an establishment of religion. High school students are capable of distingushing between equal treatment of student speech and state mandated or state endorsed religious speech.

The decision of the Eighth Circuit Court of Appeals is constitutionally correct and in accord with this Court's precedents. Certiorari is unnecessary in this case.

B. Petitioners have made material misstatements of fact in their Statement of the Case providing sufficient grounds pursuant to Rule 21.5 of this Court for denial of the Writ of Certiorari.

In the Petition's Statement of the Case, petitioners seriously misstate the facts of this case. Comparison of the statement of petitioners with the record and respondent's counterstatement highlight the material misrepresentations made in the Petition.

For the sake of brevity, two specific examples are cited for the Court. First, petitioners state at page 6 of the Petition that the school had no objection to informal meetings of the Bible Club, but only objected to school-sanctioned meetings. The record shows that the school would have stopped students from informally meeting for religious discussion if such meetings were conducted on a regular basis. Associate Superintendent Dr. Tangdall testified as follows:

> Q. If they were using one of the classrooms to discuss religious matters and they had not asked your permission to meet?
>
> A. If they were on a regular basis, I would tell them that they couldn't do that.
>
> (Tr. 636:10-14; Tangdall).

When asked the same question, Activities Director Dr. Huston stated "I don't think it's [sic] probably appropriate for us as public school, non-sectarian, to permit that. (Tr. 531:5;

Huston).

Religious speech, formal or informal was disfavored speech at WHS, so much so that petitioners stated that they would eliminate all other student organizations at WHS in order to close the forum and keep the Bible Club out:

> That in the event any one or more of the student clubs or organizations are determined to be non-curriculum related and if the Court determines that Westside High School has a limited open forum under the Equal Access Act, I would recommend to the administration and Board of Education that it consider amending the policies to discontinue such student clubs or organizations.

Affidavit of James Findley in Opposition to Request For Preliminary Inj., p. 2, No. 17, May 10, 1985, Def. Ex. 101; Affidavit of James Tangdall in Opposition to Request For Preliminary Inj., p. 2, No. 16, May 10, 1985, Def. Ex. 102.

Second, petitioners imply on pages 12 to 13 and 17 to 18 of the Petition that the issue of impressionability

remains open in this case. Based on the uncontroverted testimony of Dr. David Moshman and the format of the clubs at the school, the District Court found that high school students are not more impressionable than college age students and that they are capable of making religious sponsorship distinctions. Mergens, Slip Op. at 11, note 1. The Eighth Circuit concurred in this finding of fact, taking note that Congress in passing the Equal Access Act, made the same finding. Mergens, 867 F.2d at 1080 and n.2. Justice Powell, who raised, but did not answer the issue in Widmar, 454 U.S. at 274, n.14, stated in his dissent in Bender v. Williamsport Area School District, 475 U.S. 534, 555 (1986) that he did not believe "in this age of massive media information--that the few years difference in age between high school and college students justifies

departing from Widmar." (Powell, J. dissenting on other grounds).

This Court is not the place to relitigate the facts of this case. Because petitioners have misstated material facts, the Petition for Writ of Certiorari should be denied.

III.

CONCLUSION

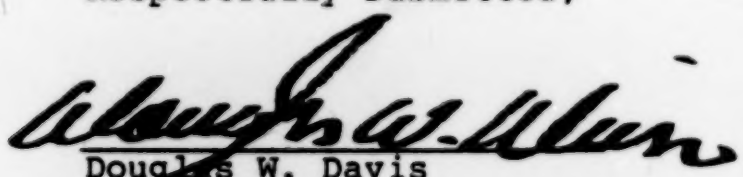
The denial of a writ of certiorari is appropriate. Judge McMillian, Chief Judge Lay and Senior Judge Gibson correctly applied the law in this case. Petitioners have made patently false statements concerning the facts of the case in an effort to have it reviewed.

Respondents recognize that this Court may be disposed to grant the writ due to the fact that the Ninth Circuit Court of Appeals, faced with the same constitutional claim as has

been made here, reached the opposite conclusion. Garnett v. Renton School District No. 603, 865 F.2d 1121 (9th Cir. 1989), petition for rehearing en banc pending.

Should the Supreme Court of the United States be disposed to grant the writ, it will have the opportunity to clearly affirm as the law of the land, the liberty of all high school students to be free from selective discrimination based on the religious content of their speech. The Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,



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